APPEALS BOARD
UTAH LABOR COMMISSION

LEO C. MELTON, **Petitioner,** **vs.** **SHARPE AIR SYSTEMS, INC. and AMERICAN EMPLOYMENT GROUP,** **Respondents.**	**ORDER AFFRIMING ALJ'S DECISION** **Case No. 04-0705**

Sharpe Air Systems, Inc. ("Sharpe") asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge George's order regarding Leo C. Melton's claim for benefits under the Utah Workers' Compensation Act, Title 34A, Chapter 2, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12 and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Melton claims workers' compensation benefits for injuries suffered from an accident at Sharpe on May 4, 2002. Mr. Melton's claim closely parallels another claim for benefits filed by Bill Lee Dorman, who was also injured while working for Sharpe. After holding an evidentiary hearing and issuing a decision on Mr. Dorman's claim, Judge George issued a similar decision on Mr. Melton's claim. Specifically, Judge George awarded medical and disability benefits to Mr. Melton and ordered Sharpe and American Employment Group ("AEG") to pay those benefits.

In requesting review of Judge George's decision, Sharpe contends that, although an evidentiary hearing was held in the Dorman matter, Sharpe was deprived of its right to an evidentiary hearing on Mr. Melton's claim. Sharpe also contends that its liability for Mr. Melton's benefits should be secondary to AEG's liability for those benefits.

FINDINGS OF FACT

The Appeals Board finds the following facts relevant to the issues presented by Sharpe's motions for review. The Appeals Board also adopts the facts set out in Judge George's decision to the extent they are consistent with this decision.

For several years before Mr. Melton's accident, Sharpe maintained workers' compensation insurance from Wasatch Crest, a company duly qualified to provide workers' compensation insurance in Utah. Wasatch Crest went out of business in early 2002. This forced Sharpe to find a

new workers' compensation insurance provider, which brought Sharpe into contact with AEG, a professional employee organization.[1]

Effective May 1, 2002, Sharpe and AEG entered into a contract whereby AEG agreed to provide various employee-related services to Sharpe in return for periodic payments from Sharpe. Among AEG's obligations was its commitment to obtain workers' compensation insurance coverage for Sharpe's employees through an entity known as ABI. While the relationship between AEG and ABI is murky at best, it is undisputed that neither ABI nor AEG was ever authorized to provide workers' compensation insurance in Utah. Consequently, although Sharpe believed that AEG had arranged for workers' compensation insurance coverage, in fact neither Sharpe nor AEG was insured under any valid policy.

Sharpe became concerned about its workers' compensation coverage after AEG failed to provide proof of coverage. On its own, Sharpe purchased an insurance policy from an authorized and well-established insurance carrier. Sharpe's coverage under this policy became effective on July 20, 2002. Unfortunately, Mr. Melton suffered his work-related injuries on May 4, 2002, before Sharpe's policy became effective.

For a period of time after Mr. Melton suffered his injuries, AEG paid his workers' compensation benefits. However, on August 2, 2004, Mr. Melton filed an Application For Hearing with the Commission to formally establish his right to continue receiving such benefits. Mr. Melton named both Sharpe and AEG as respondents to his claim.

On February 7, 2005, Judge George scheduled a formal evidentiary hearing on Mr. Melton's claim for June 7, 2005. However, on May 10, 2005, Judge George received a letter from Sharpe's attorney that stated, in part:

> We believe a ruling by the Utah Labor Commission in the case of *Dorman v. Sharpe Air Systems, Inc.* will resolve the issues in *Melton v. Sharpe Air Systems, Inc.* Thus, in the event you believe that a ruling in *Dorman v. Sharpe Air Systems, Inc.* will not be issued before June 7, we hereby request that the hearing be continued. Sharpe Air Systems, Inc. will present identical evidence and arguments at the hearing in *Melton v. Sharpe Air Systems, Inc.* and the hearing on June 7 will duplicate the issues that will be resolved in Dorman v. Sharpe Air Systems, Inc.

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1 Professional employee organizations ("PEOs"), sometimes referred to as "employee leasing companies," enter into contracts with employers ("client companies") whereby responsibilities for the client company's employees are divided between the PEO and the client. Typically, the client company retains direct control over its employees' day-to-day work while the PEO handles payroll, fringe benefits, payroll taxes and insurance. In return, the client company pays the PEO a periodic fee.

In response to this letter from Sharpe, Judge George cancelled the hearing that had been scheduled on Mr. Melton's claim. In his Notice of Cancellation, Judge George specifically stated (emphasis added): ". . . the hearing in the above captioned matter . . . **is canceled** per [Sharpe's] unopposed request. The ruling on the companion Dorman case . . . will be issued shortly, and **should dispose of this as an ancillary matter**. . . ." Sharpe did not object or otherwise respond to the terms of Judge George's Notice of Cancellation.

Judge George issued his decision in *Dorman* on July 1, 2005. That same day, he also issued his decision on Mr. Melton's claim. In summary, Judge George awarded benefits to Mr. Melton and held both Sharpe and AEG liable for those benefits.

DISCUSSION AND CONCLUSIONS OF LAW

As previously noted, Sharpe argues: 1) it was deprived of its right to an evidentiary hearing on Mr. Melton's claim; and 2) its liability for Mr. Melton's benefits should be secondary to AEG's liability for those benefits. The Appeals Board addresses each of Sharpe's arguments below.

Sharpe's right to an evidentiary hearing. Under both the Utah Administrative Procedures Act and the Utah Workers' Compensation Act, parties to disputed workers' compensation claims are entitled to an evidentiary hearing. Thus, there is no question that Sharpe had a right to an evidentiary hearing in this case. The only question is whether Sharpe waived that right.

In its letter of May 10, 2005, to Judge George, Sharpe asked that the evidentiary hearing in this case be continued. More specifically, Sharpe advised Judge George that the evidence and argument that would be presented at the hearing in this case would be "identical" to the evidence and argument that had already been presented on Mr. Dorman's claim, and that the hearing scheduled on Mr. Melton's claim would "duplicate the issues that will be resolved" in the Dorman matter.

The Appeals Board recognizes that Sharpe's letter is equivocal--it can be read as either waiving Sharpe's right to a hearing or as asking that the hearing be postponed. However, Judge George's action after receiving Sharpe's letter shows that he understood the letter as waiving the hearing. Judge George communicated his understanding of the letter by issuing his notice **canceling** the hearing because "**the ruling on the companion Dorman case** . . . **should dispose of this as an ancillary matter.**"

If Judge George's cancellation of the hearing was contrary to what Sharpe had intended, Sharpe could have so informed Judge George and requested that the hearing be rescheduled. However, Sharpe raised no objection to Judge George's cancellation of the hearing or to his stated intention to resolve Mr. Melton's claim as "ancillary" to the Dorman matter. In light of Judge George's understanding of Sharpe's May 10 letter and Sharpe's acquiescence to that understanding, the Appeals Board finds that Sharpe did, in fact, waive its right to a hearing on Mr. Melton's claim.

Sharpe's liability. Section 34A-2-401(2)(a) of the Act places responsibility for paying injured workers' benefits "on the employer and the employer's insurance carrier." In this case, despite Sharpe's efforts to maintain workers' compensation insurance coverage, no insurance was in force on the date of Mr. Melton's accident and injury. Consequently, pursuant to §34A-2-401(2)(a), primary liability for Mr. Melton's workers' compensation benefits falls on Mr. Melton's "employer."

The identity of Mr. Melton's "employer" is somewhat confused by the employee leasing arrangement between Sharpe and AEG, which divided the functions and responsibilities usually attributed to an "employer" between Sharpe and AEG. However, § 34A-2-103(3)(a) of the Act addresses that specific issue as follows (emphasis and footnote added):

> The **client company** in an employee leasing arrangement . . . **is considered the employer** of leased employees and **shall** secure workers' compensation benefits for them by complying with Subsection 34A-2-201(1) or (2) and commission rules.[2]

Thus, by virtue of § 34A-2-103(3)(a), Sharpe remained Mr. Melton's employer for purposes of the Act's coverage requirements, despite Sharpe's employee leasing arrangement with AEG. It therefore remained Sharpe's obligation to obtain workers' compensation coverage, and to pay Mr. Melton's benefits in the absence of such coverage.

The Appeals Board notes that, in other proceedings before the Commission, AEG has also accepted liability for Mr. Melton's benefits. However, this does not eliminate Sharpe's statutory duty as Mr. Melton's employer to pay those benefits. The Appeals Board therefore finds that AEG and Sharpe have concurrent liability for Mr. Melton's medical expenses and disability compensation. Mr. Melton is entitled to enforce his right to such benefits directly against both those entities.

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[2] Subsection 34A-2-201(1) and (2) referenced in § 34A-2-103(3)(a) authorize employers to satisfy their obligation to provide workers' compensation coverage by purchasing insurance from the Workers Compensation Fund or from some other authorized workers' compensation insurance carrier.

ORDER

The Appeals Board affirms Judge George's order. It is so ordered.

Dated this 8th day of April, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.